

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION**

CHRISTOPHER BARBOUR,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2:01-cv-612-ECM
	)	
JOHN Q. HAMM, Commissioner,	)	
Department of Corrections,	)	
et al.,	)	
	)	
Respondents.	)	

**RESPONDENTS' RESPONSE TO BARBOUR'S MOTION FOR  
LEAVE TO FILE THIRD AMENDED PETITION**

Come now Respondents, by and through the Attorney General for the State of Alabama, and, pursuant to this Court's March 23, 2023 order, file this response to Barbour's motion for leave to file a third amended petition for writ of habeas corpus asserting the following:

1. On May 21, 2001, Barbour filed an untimely petition for writ of habeas corpus challenging his 1993 capital murder conviction and death sentence (Doc. 1), which was amended in 2005. (Doc. 59.)

2. On March 20, 2023, Barbour filed a motion for leave to file a third amended petition because he "has discovered new important facts that warrant amendment." (Doc. 337 at 1.) He asserts that, "in an abundance of caution," he seeks to amend his petition "in order to ensure that there is no dispute that [he] timely

pleaded and filed the claims based on the evidence disclosed for the first time[.]” (*Id.* at 2, 4.) On March 23, 2023, this Court ordered Respondents to respond to Barbour’s motion requesting leave to amend his petition. (Doc. 340.)

3. As Barbour notes, with leave of this Court, he may amend his petition under Rule 15(a)(2) of the Federal Rules of Civil Procedure. In his amendment, Barbour appears to have amended his original argument regarding DNA testing, which has been the basis of his gateway actual innocence claim, to now assert a freestanding actual innocence claim under *Herrera v. Collins*, 506 U.S. 390 (1993). (Doc. 337-6 at 51–52.) Barbour’s amended petition appears to forego his attempt to overcome his untimely filing with alleging a gateway actual innocence claim and instead moves this Court to consider his actual innocence claim as a freestanding claim. Regardless, his claim is based on the same assertions made to this Court to support his gateway actual innocence claim. As such, contrary to Barbour’s assertion (Doc. 337 at 4), this claim has relevance to the evidentiary hearing that is currently scheduled in June 2023. Further, to the extent a *Herrera* claim is raised, Respondents object given the parties have not previously briefed this issue and the hearing is set approximately two months from now.

4. Barbour also seeks to raise a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), a claim under *Napue v. Illinois*, 360 U.S. 264 (1959), and an ineffectiveness of trial counsel claim. (Doc. 337-6 at 52–57, 63–70, 89–93.) These

three claims allegedly stem from discovery this Court ordered in April 2022 regarding Barbour's gateway actual innocence claim. (*Id.*) Regarding these claims, Respondents do not object to Barbour's motion.

5. Moreover, Respondents do not concede that any of the claims raised in the third amended petition are properly before this Court. Respondents also do not waive any future defenses or arguments regarding these claims, including, but not limited to, whether they are barred by the statute of limitation, procedurally defaulted, fail to raise a federal question or are without merit.

Respectfully submitted,

Steve Marshall (MAR083)

*Attorney General*

By:

s/Audrey Jordan

Audrey Jordan

*Assistant Attorney General*

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of April 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will provide notification of such filing to the following CM/ECF participants: **George Kendall, Samuel Spital, Nicola Cohen, Miriam Gohara, and Santino Coleman.**

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